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SUBJECT: PSI SHIPBOARDING AGREEMENT NEGOTIATIONS WITH
UKRAINE, FEB. 13, 2008 - DELEGATION REPORT

REF: A. 05 KYIV 04998
[B](#). 07 KYIV 00513
[C](#). 07 STATE 161772

[1](#)1. Summary: U.S. and Ukrainian negotiating teams discussed the major areas of disagreement regarding the draft Proliferation Security Initiative (PSI) shipboarding agreement during a second round of talks in Washington, DC on February 13, 2008. Major issues identified for near-term follow-up include the following:

(a) whether Ukraine may authorize access to cargo sealed under the customs authority of a third party in view of perceived Ukrainian international and domestic obligations and customs maintenance regimes;

(b) whether the U.S. and Ukraine can reach mutually acceptable guidelines for the use of force during boarding operations consistent with the domestic laws of both countries;

(c) whether Ukraine will be amenable to including the exclusive economic zone (EEZ) of both countries in the geographic scope of the PSI shipboarding agreement; and

(d) whether a side letter describing claims procedures would be useful in documenting the understanding of both Parties. In addition, the U.S. committed to develop a table-top exercise to assist both countries in understanding how the agreement would work in practice, and to provide sample request forms as potential attachments to the agreement. Both delegations judged the meeting very useful in enhancing understanding and bringing the two countries' positions closer together. End Summary.

[1](#)2. The U.S. had provided Ukraine with a proposed text of a bilateral PSI shipboarding agreement in early 2005. The first round of negotiations was held in Kyiv in December 2005 (ref A). In early 2007, the U.S. received a Ukrainian counter-draft (ref B). The U.S. review of the counter-draft raised a number of questions and concerns. Fifteen key U.S. concerns were conveyed to the Ukrainian side in late 2007 (ref C). Ukraine provided informal interim responses in late January 2008. The purpose of the February 13, 2008 meeting was to gain a better understanding of the perceived legal and language barriers accounting for the majority of the numerous expressed concerns.

STANDARD FOR "SUSPECT VESSEL"

[1](#)3. The Ukrainian and U.S. negotiating teams discussed the definition of "suspect vessel" as proposed by the U.S. in the PSI shipboarding agreement text and subsequently modified by Ukraine. The standard to determine whether a

vessel is "suspect" in the UN Convention on the Law of the Sea is whether there are "reasonable grounds to suspect" illegal activities are taking place on the vessel. Ukraine proposed a standard of "objective facts to confirm" a vessel is engaged in suspect activities. The U.S. explained the standards for what is "reasonable," emphasized the requesting Party's need to maintain credibility in the international community, highlighted the flag state's right to permit or deny boarding, and provided examples of indicators considered by the U.S. in determining whether it has reasonable grounds to suspect a vessel to be engaged in suspect activities. These examples and explanations appeared to reduce Ukrainian concerns that Ukrainian flag vessels might be subjected to search upon a chance encounter.

¶4. The U.S. also noted that this definition was not the appropriate place for the exemption of warships and vessels on government service, to which the Ukrainians seemed amenable as long as the exemption was clearly stated in the agreement.

DEFINITION OF "INTERNATIONAL WATERS"

¶5. Ukraine's proposal limited the scope of the PSI shipboarding agreement by defining "international waters" to exclude the exclusive economic zone (EEZ). During the meeting, Ukraine proposed excluding only the U.S. and Ukrainian EEZs from the PSI shipboarding agreement. The U.S. explained that such an exclusion is inconsistent with the law of the sea and cannot be part of such an agreement because it would be perceived as legitimizing the excessive territorial claims of other countries. Following lengthy discussions, the Ukrainians decided they needed further internal consultations on the definition of "international waters" for purposes of this agreement.

SCOPE OF AGREEMENT AND CARGO

¶6. Due to restrictions contained in Ukrainian domestic customs maintenance laws, Ukraine considers itself unable to authorize the opening of cargo boxes or containers on Ukrainian flagged vessels if the cargo was sealed by authorities in another country. Liability concerns were also raised. The U.S. noted that U.S. law allows opening and search of any cargo on a U.S. ship or in U.S. waters. The U.S. explained that inspection of sealed containers on container ships is not contemplated during an at-sea boarding under the PSI shipboarding agreement due to logistical challenges. Ukraine promised to consult further with its customs attorneys and to review existing Ukrainian laws. For its part, the U.S. proposed to build customs scenarios into a practical training exercise for Ukraine, along with references to appropriate authorities to demonstrate how the PSI shipboarding agreement would function and how claims would be processed.

COOPERATION "SUBJECT TO THE AVAILABILITY OF RESOURCES"

¶7. Ukraine expressed concern over the U.S.-proposed language in the PSI shipboarding agreement that limits the parties' commitment to cooperation "subject to the availability of resources." For instance, Ukraine was concerned it would be exploited as a loophole to circumvent the process set forth in the PSI shipboarding agreement if technical communication modes failed or were otherwise unavailable. The U.S. assured Ukraine that the language was included not as a means to circumvent the process but, rather, based on the fact that the U.S. cannot commit funds absent the authority to spend pursuant to an appropriation from Congress. Ukraine stated that, for it, this concept was captured in the phrase "in

accordance with national legislation." The U.S. suggested replacing the ambiguous language with the term "within the means available" as contained in the 2005 Protocol to the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA), and also offered to clarify in Article 4 that the approval process may not be circumvented.

VESSELS WITHOUT NATIONALITY

18. The U.S. proposed language in the PSI shipboarding agreement noting the authority of warships to board and inspect vessels without nationality consistent with Article 110 of the Law of the Sea Convention. Ukraine was concerned about potential claims against it by third parties boarded by the U.S. on grounds that the vessel was without nationality. Ukraine was also concerned about being subjected to potential claims if Ukraine was unable to confirm the nationality of its own vessel and the U.S. subsequently boarded the vessel as stateless. The U.S. directed Ukraine to the claims provisions contained in Article 12 of the PSI shipboarding agreement. The U.S. also pointed out that the text proposed by Ukraine in Article 4, paragraph 2.3 necessitated including the authority of warships to board stateless vessels in the PSI shipboarding agreement. Ukraine expressed openness to including text stating that the PSI shipboarding agreement does not preclude either Party from exercising its authority consistent with the Law of the Sea Convention. As an alternative, Ukraine suggested including provisions on stateless vessels in a separate article. The U.S. urged Ukraine to agree to keep all text related to the scope of the agreement in Article 3, and to agree to the U.S.-proposed procedures for boarding stateless vessels in Article 4, paragraph 4.

TWO-STEP APPROVAL PROCESS

19. The PSI shipboarding agreement as edited by Ukraine would require a two-step process: (1) for a Party to confirm registry of a vessel; and (2) after registration is confirmed, for a Party to agree to a request to board the vessel. Ukraine would be comfortable with a process allowing for a single request both to verify registry and board a vessel, as long as the U.S. understood that Ukraine may respond to such requests in two phases. The U.S. agreed to

this procedure. Ukraine also expressed concern that information in request or reply forms might be disclosed to third parties. The U.S. reminded Ukraine that the information would be exchanged between the designated Competent Authority of each Party and offered to provide Ukraine with sample request forms to alleviate such concerns.

The U.S. provided Ukraine with sample forms on February 14, 2008. NOTE: Department is preparing bilingual forms that can be filled in on a computer rather than by hand. END
NOTE.

COMPENSATION FOR BOARDING STATELESS VESSELS

10. The U.S. was unable to accept Ukraine's proposed text regarding claims made by vessels boarded as stateless vessels, as discussed above in paragraph 8 of this cable. Ukraine agreed to removal of its proposed Article 4, paragraph 2.3 as long as Article 4, paragraph 1 contained language requiring the Parties to act towards stateless vessels consistent with the law of the sea, thereby protecting the interests of vessels whose Ukrainian registry was not confirmed until after the fact. Ukraine's concern was not to be held responsible for actions taken toward vessels not under the Ukrainian flag.

REFUSAL OF MASTER

¶11. The text of the PSI shipboarding agreement as proposed by Ukraine would permit the master of a vessel to deny a Party from boarding, even when the flag State consented to the boarding. The U.S. stated it would not agree to language that allows the master of a vessel to deny a boarding. Ukraine was concerned about potential liability of a master, which the U.S. suggested should not be a concern as long as the master was not knowledgeable of the illegal cargo. Ukraine explained that under its domestic law, a Captain of a Ukrainian flagged vessel has discretion to deny a boarding outside territorial waters, except for matters related to law enforcement or customs. Ukraine therefore believed it could agree to remove the provision, since the PSI shipboarding agreement related to law enforcement and would become law upon entry into force.

JURISDICTION AND WAIVER

¶12. The U.S. and Ukraine agreed conceptually to the possibility of a waiver of jurisdiction as stated in the U.S.-proposed Article 5 on Jurisdiction over Detained Vessels. The teams discussed the distinction between "primary right of jurisdiction" and "exclusive jurisdiction," which was not clear to Ukraine. The U.S. agreed that Ukraine's proposed Article 11, paragraph 2 on release of a suspect vessel was the flag state's right.

USE OF FORCE

¶13. Ukraine took significant issue with the U.S.-proposed Article 9 of the PSI shipboarding agreement setting forth standards for the use of force during boarding and search of suspect vessels. Ukraine proposed detailed provisions consistent with its domestic law, with the expectation that U.S. law enforcement officers would comply with Ukrainian domestic laws and regulations on Ukrainian flag vessels. The U.S. opposed the expectation that law enforcement officers of either Party be required to conduct their boarding operations in accordance with the laws of the other Party. The U.S. provided Ukraine with copies of Chapter 4 of the U.S. Coast Guard Maritime Law Enforcement Manual (Coast Guard Use of Force Policy). Lawyers for the U.S. and Ukrainian negotiating teams committed to compare the laws and regulations for each country regarding the use of force and consider the viability of drafting a common use of force policy.

EXCHANGE OF INFORMATION ON NATIONAL LAWS

¶14. Ukraine found it inconsistent to require knowledge of flag State laws without also imposing an obligation that the Parties abide by such laws. The U.S. explained the inherent impossibility of requiring law enforcement officers of one Party to comply with laws of the other Party. The U.S. pointed out that the safeguards contained in Article 8 and international law protect against abuses by law enforcement agents and that an exchange of information on national laws is necessary to align expectations of the Parties and their law enforcement agents in the execution of this agreement. As discussed in paragraph 13 above, the U.S. suggested that both Parties take a closer look at their domestic laws, particularly with regard to the use of force. If the laws for both countries are sufficiently consistent with one another, the Parties could consider including text acceptable to both sides.

CLAIMS

¶15. Ukraine proposed imposing the law of the flag State to resolve claims from third parties. The U.S. was unable to accept this proposal and explained how the U.S. processes and pays claims by foreign nationals. The U.S. also provided Ukraine with a written explanation of U.S. claims laws and procedures to review. Ukraine will review the letter to determine if such a letter could resolve Ukraine's concerns. NOTE: This explanation has been translated into Ukrainian and provided to the Ukrainian Embassy. END NOTE.

DISPUTES AND ARBITRATION

¶16. Ukraine proposed that any disputes surrounding the PSI shipboarding agreement be resolved through arbitration, and urged the U.S. to allow for arbitration in its domestic law. The U.S. explained it is unable to commit to arbitration for resolution of disputes in agreements of this type, and cannot use this agreement to change U.S. law because it is not subject to legislative approval. Ukraine warned the agreement would be very difficult to ratify if it stated that claims and disputes must be handled according to the U.S. court system. The U.S. agreed that another state also could raise disputes with it via diplomatic channels.

NOT PREJUDICING INTERNATIONAL LAW

¶17. Ukraine bracketed U.S.-proposed language (U.S.-proposed Article 14, subparagraph b) stating that the agreement would not prejudice the position of either Party with regard to international law or territorial or maritime boundaries. Since the U.S. had included the provision in view of existing maritime claims by Ukraine in the Black Sea, the U.S. agreed to delete the provision given Ukraine's objection to it.

COOPERATION AND ASSISTANCE

¶18. Ukraine had bracketed the U.S.-proposed text on cooperation in providing technical assistance. The U.S. explained the potential benefit of the provision. Ukraine dropped its objection in principle, but was not able to decide whether the provision should refer to the "Competent Authorities" or the "Parties." The Ukrainian delegation needed to consult with other experts and study the provision further.

COMMENT

¶19. The U.S. Government appreciates the careful review by Ukrainian agencies and departments of the draft PSI shipboarding agreement. U.S. agencies and departments have given similarly careful review to Ukraine's proposed draft dated January 26, 2007. The meeting on February 13, 2008 was productive in resolving a number of misunderstandings and communicating to Ukraine that many of its revisions are acceptable to the United States.

¶20. There remain certain revisions and additions proposed by Ukraine, however, that attempt to change the intended scope of this agreement, or that are inconsistent with what the U.S. Government may commit to in such agreements. The U.S. will strive to work with Ukraine to review the relevant domestic laws of both Parties in order to reach mutually acceptable language on use of force standards during boardings as well as the processing of claims. Ukraine has agreed to investigate further any restrictions based on its customs maintenance law and, if necessary, to seek changes to its domestic laws.

¶21. (U) Delegations:

-- U.S. delegation:

J. Ashley Roach, State/L-OES
CDR Vida Antolin-Jenkins, CJCS-LC
LCDR Rachael Bralliar, U.S. Coast Guard
Paul Dean, State/L-NPV
Robert Gonzales, State/EUR-UMB
Jane Purcell, State/ISN-CPI
Wayne Raabe, Department of Justice/CRIM-NDDS
Michael Uyehara, U.S. Embassy, Kyiv
LT Tamara Wallen, U.S. Coast Guard
Robert (Chip) Wedan, DoD/GC
Ms. Marta Zielyk, interpreter
Ms. Matilda Kuklish, interpreter

-- GOU delegation:

Volodymyr Bielashov, MFA
Oleksandr Bondarenko, MFA
Ruslan Nimchynskyi, Ukrainian Embassy
Olexander Osadchyi, Ukrainian Embassy
Viktor Seredniy, State Border Guards
Volodymyr Shkilevych, Ukrainian Embassy
Liudmyla Sidlovska, Ministry of Justice
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